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Supreme Court of the United States

OCTOBER TERM, 1956

No. 966

WILBERT CHARLES SCHULTZ, JR., Petitioner

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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No.

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TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction of petitioner by the United States District Court for the Northern District of New York for a violation of the Universal Military Training and Service Act.

OPINIONS BELOW

There is no opinion of the Court of Appeals. The court affirmed on the opinion of the District Court. (Appendix A, p. 22, *infra*) The opinion of the District Court is not reported. (R. 4-13)

JURISDICTION

The judgment of the Court of Appeals was entered in this case on March 28, 1957. (See Appendix B, *infra*, page

24.) A petition for rehearing was filed on April 3, 1957. It was denied on April 15, 1957. (See Appendix C, *infra*, page 25.) The time for filing this petition for writ of certiorari expires May 15, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1). (See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.) The District Court had jurisdiction under 18 U. S. C. § 3231.

QUESTIONS PRESENTED

I.

Since the definition of the term minister of religion appearing in the act and the regulations does not hinge the exemption from service upon whether the minister has been graduated from a theological seminary, did the local board deny the petitioner procedural due process of law or a full and fair hearing upon his personal appearance by holding that he was not entitled to the exemption because he had not been graduated from a theological seminary?

II.

Since the regulations require notification of the action taken upon a request for reopening, did the local board deny the petitioner procedural due process of law when it failed to notify him of the final refusal to reopen and reclassify him as requested?

STATUTES INVOLVED

Section 16 (g) (1), (2) and (3) of the Universal Military Training and Service Act prescribes the definition of a minister:

> "The term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and

practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

"(2) The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."—50 U. S. C. App. § 466 (g) (1), (2) and (3), 62 Stat. 624.

SELECTIVE SERVICE REGULATIONS INVOLVED

Section 1622.43 of the Selective Service Regulations (32 C. F. R. § 1622.43) reads in part as follows:

"§ 1622.43 *Class IV-D: Minister of religion or divinity student.*—(a) In Class IV-D shall be placed any registrant:

"(1) Who is a regular minister of religion;

"(2) Who is a duly ordained minister of religion; . . ."

Section 1626.23 of the Selective Service Regulations provides: "If any steps have been omitted by the local board . . . the appeal board shall return the file to the local board with a request for . . . action."—32 C. F. R. § 1626.23.

"Part 1625—Reopening and Considering Anew Registrant's Classification

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"AUTHORITY: §§ 1625.1 to 1625.14 issued under sec. 10, 62 Stat. 618, as amended; 50 U. S. C. App., 460.

"SOURCE: §§ 1625.1 to 1625.14 contained in E. O. 9988, 13 F. R. 4874, Aug. 21, 1948, except as otherwise noted. Redesignated at 14 F. R. 5021, Aug. 13, 1949.

"REOPENING REGISTRANT'S CLASSIFICATION

"§ 1625.1 *Classification not permanent.* (a) No classification is permanent.

"(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof.

"(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local

board to keep currently informed concerning the status of classified registrants.

"[E. O. 9988, 13 F. R. 4874, Aug. 21, 1948, as amended by E. O.10292, 16 F. R. 9862, Sept. 28, 1951]

"§ 1625.2 *When registrant's classification may be reopened and considered anew.* The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

"§ 1625.3 *When registrant's classification shall be reopened and considered anew.* (a) The local board shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selective Service and upon receipt of such request shall immediately cancel any Order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant.

"(b) The local board shall reopen and consider anew the classification of a registrant to whom it has

mailed an Order to Report for Induction (SSS Form No. 252) whenever facts are presented to the local board which establish the registrant's eligibility for classification into Class I-S because he is satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning.

"[E. O. 10292, 16 F. R. 9862, Sept. 28, 1951]

"§ 1625.4 *Refusal to reopen and consider anew registrant's classification.* When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required.

"CLASSIFICATION ANEW

"§1625.11 *Classification considered anew when reopened.* When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have

the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.

"§ 1625.12 *Notice of action when classification considered anew.* When the local board reopens the registrant's classification, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of § 1623.4 of this chapter.

"§ 1625.13 *Right of appeal following reopening of classification.* Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

"§ 1625.14 *Order to report for induction to be canceled when classification reopened.* When the local board has reopened the classification of a registrant, it shall cancel any Order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant. If, after the registrant's classification is reopened, he is classified anew into a class available for service, he shall be ordered to report for induction in the usual manner."

STATEMENT OF THE CASE

This criminal action was brought by indictment charging petitioner with a violation of the Universal Military Training and Service Act. (50 U. S. C. App. §§ 451-470) Petitioner was charged with failing and refusing to perform civilian work contrary to the act. (R. 3) The petitioner pleaded not guilty. (R. 2)

The case proceeded to trial before the judge without a jury, which was waived. (R. 2) Testimony was received

and documentary evidence admitted into the record. (R. 14-57)

A motion for judgment of acquittal was made at the close of all the evidence. (R. 2) The motion for judgment of acquittal was denied. (R. 2, 4-13) The trial judge found petitioner guilty, entered a judgment of conviction and sentenced petitioner to eighteen months in the custody of the Attorney General of the United States. (R. 3-4, 4-13) The court filed a written memorandum giving reasons for the judgment rendered. (R. 4-13)

The case was duly appealed to the court below. (R. 71) The case was duly briefed, argued and submitted, resulting in an affirmance of the conviction. A petition for rehearing in the court below was denied. (Appendix C, *infra*, page 25)

STATEMENT OF FACTS

Petitioner was born on December 3, 1932. (R. 25, 27) He registered with the local board on July 24, 1951, and was thereafter mailed a classification questionnaire on February 4, 1952. This was filled out by the registrant and filed with the local board on February 11, 1952. (R. 25-29)

In the questionnaire Schultz showed that he was a minister of Jehovah's Witnesses since November, 1951. He added that he was studying for the ministry in a theological divinity school of the Watchtower Bible and Tract Society conducted at the Wellsville, New York, Congregation of Jehovah's Witnesses. He also showed that he was a full-time carpenter engaged in building houses for a contractor, earning $1.00 an hour. He showed that he averaged 40 hours per week in this secular work.

His schooling, in addition to the ministry, was shown to be six years of elementary school, two years of junior high school and cne year of high school. He added that he had not been graduated. (R. 27)

Petitioner signed Series XIV of the questionnaire certifying that he was a conscientious objector, which required the local board to mail him the conscientious objector form.

(R. 28) The local board, without complying with the request for a conscientious objector form, classified petitioner I-A and notified him thereof. (R. 29) With the notice of classification the board mailed him the conscientious objector form. (R. 29) This form was filled out and returned on February 27, 1952. (R. 32-37)

On February 25, 1952, petitioner filed with the local board an appeal for a classification "from 1 A to 4 D." This document contained extensive argument why the registrant was requesting classification as a minister of religion and as a student preparing for the ministry. (R. 37-40) The local board on February 29, 1952, reclassified Schultz as a conscientious objector. The classification of I-O given to him obligated him to perform civilian work in lieu of induction into the armed forces. He was notified of his classification on March 3, 1952. (R. 29) Petitioner filed another appeal. This time it was "from 1-O to 4-D." The appeal contained extensive argument as to why petitioner should be classified either as a minister or as a student for the ministry. (R. 40-42) Accompanying the appeal was a supporting certificate that Schultz was attending the Theocratic Ministry School of Jehovah's Witnesses at Wellsville, New York. (R. 42-43)

On the next day after receiving the appeal the local board forwarded the papers to the appeal board. This was March 13, 1952. The appeal board on July 31, 1952, classified petitioner as a conscientious objector, placing him in Class I-O (R. 29) He was notified of this and thereafter was ordered to take a physical examination, resulting in his being found acceptable. (R. 29) On November 24, 1952, petitioner filed a letter calling to the attention of the local board that he had not been granted a personal appearance and because of this stated to the local board "you should consider my appeal." (R. 43) He also filed an appeal for a minister's classification. (R. 44) The local board acknowledged receipt of his letters and informed him "you have the right to appear before the Board at any

time." He was notified that he would be given an appointment. (R. 30, 45)

On December 3, 1953, petitioner appeared before the local board and orally stated that he would not do conscientious objector work but that he wanted an opportunity to appear before the board to "testify for God." (R. 45-46) He was commanded to appear before the local board on December 5, 1952. (R. 30) Upon the personal appearance the chairman stated that the hearing was being held upon the request for reclassification. (R. 15) The chairman said "that they could not go over the head of the Appeal Board; they could not re-open so they could not reclassify me no matter what evidence I might bring forth." (R. 15) Petitioner also testified that the chairman said, "as far as me being a ministry, or my minister's claim, he said I had not graduated from a theological seminary therefore I wouldn't be qualified." (R. 16) Petitioner then pointed to his certificate of ordination appearing in the draft board file and the members of the board said that "there wasn't a certificate of graduation for me from a religious theological seminary, therefore they could not consider it. That is about all there was to it, and they said I might go then." (R. 16)

Petitioner on cross-examination testified that the board members said the reason they denied him the IV-D classification was because he had not in fact attended a theological school. He was asked then if that was the only reason and he said: "That was the reason." (R. 19)

On redirect examination petitioner testified that the only reason that he was not reclassified was the two grounds stated by the chairman of the local board. One was that the local board could not overrule the appeal board. The other was that petitioner had not attended a theological seminary. (R. 21-22)

The testimony of petitioner was fully corroborated by the clerk of the local board. She said: "Well as I remember, they read the regulations in which it stated in order to be entitled to a 4-D you must have been a graduate of or a

student at a theological seminary and in view of the fact that he was not, he just didn't qualify for a 4-D." (R. 23)

The summary of the hearing made by the chairman of the local board also supports the testimony of the petitioner. The memorandum states that petitioner upon the personal appearance claimed to be an "ordained minister although he has no educational training by an approved institute of learning." (R. 47)

The local board at the conclusion of the hearing upon the request for a reopening refused to reclassify petitioner as a minister and noted in the minutes that there would be no change "in classification." (R. 30)

Petitioner was notified to go to the unemployment office about civilian work as a conscientious objector. He refused to go and also did not fill out the forms agreeing to do the civilian work. (R. 30, 48-51) From January 1953 to January 1954 there were several hearings and interviews among petitioner, the board members and a representive of the State Director over his refusal to do civilian work. (R. 30-31)

The local board on April 14, 1954, mailed petitioner a questionnaire containing eleven questions about ministerial work and one question about his conscientious objection. This is indicated in the minutes as a request for "current information." (R. 31) The questionnaire was answered by the petitioner. (R. 52-55) He showed the local board that he spent 43 hours in his ministry work, conducted two home Bible studies, gave one Bible talk and visited 23 people. He added that he also spent ten hours in performing his duties as stock servant in the congregation and three hours as assistant study conductor. He also spent 38 hours preaching and distributing literature. (R. 54) He showed that he worked 40 hours a week for Bausch and Lomb Optical Co. during a part of the year but that at the present time he was working only 24 hours a week as a carpenter's helper for his father. (R. 53)

The local board on May 3, 1954, upon reviewing the new information received, ruled that the case would not be reopened. The minutes show that the State Director was notified of this refusal to reopen on May 3, 1954. (R. 31, 56-57)

On May 10, 1954, petitioner was mailed an order commanding him to report for civilian work at the Marcy State Hospital, Marcy, New York, on June 1, 1954. (R. 31, 57-58) This was pursuant to the instructions of the State Director. (R. 58-59) He reported to the local board but did not proceed to the hospital as commanded. (R. 60)

REASONS FOR GRANTING THE WRIT

There is a direct conflict between the holding of the court below and the holding in *Niznik* v. *United States,* 184 F. 2d 672 (6th Cir. 1950). The *Niznik* case involved an identical ruling by the local board. In that case there was an appeal to the appeal board, resulting in a denial of the ministerial exemption claim. Also in *Niznik* each of the registrants was, as a matter of law, not entitled to the exemption because the ministry was his avocation instead of his vocation. The Court of Appeals for the Sixth Circuit on facts identical to those involved in this case held that there was a denial of procedural due process. The holding of the court below is also in direct conflict with *Shepherd* v. *United States,* 217 F. 2d 942 (9th Cir. 1954) (rehearing denied 220 F. 2d 855). In that case the refusal by the draft board to follow the definition of a minister of religion fixed by Congress in the act was equivalent to a complete denial of any hearing at all. A "hearing proceeding upon an erroneous theory . . . is no better than no hearing at all." —*Shepherd* v. *United States,* 217 F. 2d 942, 946 (9th Cir. 1954); see also *Sicurella* v. *United States,* 348 U. S. 385 (1955), with which decision by this Court the holding of the court below also conflicts.

The position that the petitioner takes in this petition has been recently supported by a strong opinion by Chief Judge

Hutcheson of the Court of Appeals for the Fifth Circuit. That court, just one day before the court below handed down its decision in this case, ruled just to the contrary of the court below. Read *Pate* v. *United States,* No. 16,078, March 27, 1957, at pages 5-9 of the slip opinion. Nine copies of that opinion accompany this petition for the convenience of the Justices of this Court.

In that case the board proceeded to consider a claim for classification as a minister of religion by one of Jehovah's Witnesses, as in this case, on a wrong theory. The Court held, however, that the registrant was denied procedural due process of law and full and fair hearing. In view of the artillery the Court of Appeals for the Fifth Circuit has supplied to petitioner in this case in the shape of that opinion—which is much heavier than the opinion of Judge Brennan adopted in this case by the court below—this Court ought to consider the question involved in this case by granting this petition.

The ruling made by the court below in this case is in conflict with what the Court said in *Estep* v. *United States,* 327 U. S. 114, 121 (1946). There the Court said that if a "local board . . . classified a registrant as available for service, because he was a Jew, or a German, or a Negro, it would act in defiance of the law. . . . In all such cases its action would be lawless and beyond its jurisdiction." It should be noted that the Court said "local board." The Court thus rejected the rationalization now accepted by the court below.

This case involves the interpretation of a very important question of law in the administration of the Universal Military Training and Service Act which should be resolved in the interest of orderly administration of such law. It is the question that was directly decided in *Niznik* v. *United States,* 184 F. 2d 972 (6th Cir. 1950). Even the court in *United States* v. *Chodorski,* 240 F. 2d 590 (7th Cir. 1956) (now pending on petition for writ of certiorari, No. 858, October Term, 1956), at page 591, said:

> "... Upon the first question it is obvious from the record, we think, that the local board applied a wrongful test in determining the question presented to it of whether defendant was a minister of religion."

The refusal by the local board to follow the definition of a minister of religion fixed by Congress in the act was equivalent to a complete denial of any hearing at all.

This petition presents, as above shown, a most important question of federal law which has not been, but which ought to be, reviewed by this Court. The denial of procedural due process by failure to follow the definition of the term "minister of religion" in the act is of wide public or national importance.

The problem is not temporary or limited to just a few cases. There are about four thousand local boards with whom thousands of registrants claiming exemption as ministers of religion have their cases. Several hundred of these boards have failed to comply with the regulation defining the term "regular minister of religion." Several thousand registrants are affected by the question here presented.

Two opinions of the district courts, invalidating orders of the local boards under circumstances identical to those described in the record in this case, demonstrate the importance of the question here presented.—*United States* v. *Fielder,* 136 F. Supp. 745 (E. D. Mich. 1954); *United States* v. *Kose,* 106 F. Supp. 433 (D. Conn. 1951).

The undisputed evidence showed that the local board proceeded to consider the ministerial exemption upon the erroneous theory that petitioner had not attended a theological seminary. (R. 15, 22-23) The trial court confused the facts and erroneously held that the board was proper in considering the matter because in the questionnaire appellant showed that he was a student preparing for the ministry and that the remark of the board referred to his attendance at the Theocratic Ministry School. (R. 11) It should be remembered that the questionnaire was filed with

the local board on February 11, 1952. On December 5, 1952, ten months later, there had been a change in the facts and circumstances. In the questionnaire Schultz showed that he was a regular minister and was not ordained. (R. 26) He showed that he was attending the divinity school of Jehovah's Witnesses under the direction of the Watchtower Bible and Tract Society. (R. 26) After attending the school about ten months after the filing of the questionnaire he changed his status from an unordained minister or regular minister to a duly ordained minister. (R. 42-44) There is no question but that the local board on December 5, 1952, was not considering his status for the ministerial status as shown in the questionnaire filed in February 11, 1952. The memorandum of the local board itself shows that the local board was considering his new claim to his status, that was "ordained minister." See the memorandum of the local board. (R. 47)

The testimony of the clerk of the local board showed that the board understood that they were considering, not a claim for exemption because of being a student minister, but his ministerial claim. (R. 22) It is obvious therefore that the trial court got off to a bad start in a consideration of the facts that resulted in the erroneous conclusion, that the board was considering the claim as that of a student for the ministry. Read the opinion. (R. 10-13) The board was not considering his student's claim, which had been made at the time of filing his questionnaire. The board was reviewing the new evidence and the status of the petitioner as of December 5, 1952, at which time he was no longer a regular minister attending a divinity school but had now become an "ordained minister" as a result of his prior attendance at the Theocratic Ministry School. (R. 47)

In the light of the real facts this Court ought to grant the writ so as to review the judgment of the court below upon the following statement appearing in the opinion of the district court below: "If this was the attitude and understanding of the board, there is no question but they were

in error (50 U. S. C. Appendix 466(g) (1) (2) (3))." In the light of the facts appearing in the record it must be concluded that the "If" is true. The board did have such erroneous attitude and understanding which constitutes a denial of procedural due process of law.—*Niznik* v. *United States*, 184 F. 2d 972 (6th Cir. 1950); *United States* v. *Kose*, 106 F. Supp. 433 (D. Conn. 1951); *United States* v. *Fielder*, 136 F. Supp. 745 (E. D. Mich. 1954).

It should be noted that the proper definition of a minister of religion does not include the fictitious and foreign element of a certificate of graduation from a theological seminary. Congress did not intend that a minister have his background questioned. Senator Tom Connally specifically rejected such efforts when the act was brought before Congress. He said:

> "Mr. President, when I was a boy none of the preachers whom I ever heard preach could have taken the benefit of that exemption. . . . Many good old cornfield preachers who gathered their flocks around an open Bible on Sunday morning or gathered their flocks in camp meeting in the summertime, and got more converts during those two weeks than they got all the year, because next year they would get all those converts over again and then some new ones, never saw a divinity school. They never were in a seminary; but they walked with their God out yonder amidst the forests and plains; they read His book at night by kerosene lamp or tallow candle."—86 Cong. Rec. 10589-10590.

The Universal Military Training and Service Act prescribes a definition of a minister different from that employed by the draft board. See the act, *supra*, page 3.

In the circumstances the local board entirely neglected to proceed according to law on the occasion of the personal appearance. It is irrelevant and immaterial that the petitioner was not entitled to the ministerial classification. Even

a man without a prima facie case for classification as a minister of religion is entitled to be fairly and properly heard. It is the obligation of an administrative tribunal to proceed according to the legal definitions prescribed by Congress. This has been established beyond cavil in the case of conscientious objectors by the Supreme Court of the United States.

It has been held that where the local board, upon personal appearance, rules—as in this case—that a registrant is not entitled to the exemption because he does not produce a certificate of graduation from a theological seminary, such a hearing is not a fair hearing. The courts have held that such a procedure is a denial of procedural due process of law upon the claim for classification as a minister. —*United States* v. *Kose,* 106 F. Supp. 433 (D. Conn. 1951); *Niznik* v. *United States,* 184 F. 2d 972 (6th Cir. 1950); compare *United States* v. *Fielder,* 136 F. Supp. 745 (E. D. Mich. 1954).

It is necessary for the local board to comply strictly with the law upon personal appearance.—*United States* v. *Graham,* 108 F. Supp. 794 (N. D. N.Y. 1952); see also *Davis* v. *United States,* 199 F. 2d 689 (6th Cir. 1952); *Bejelis* v. *United States,* 206 F. 2d 354 (6th Cir. 1953).

It is also fundamental that an appeal board classification does not cure the denial of rights guaranteed by law upon personal appearance.—*United States* v. *Zieber,* 161 F. 2d 90 (3rd Cir. 1947); *Knox* v. *United States,* 200 F. 2d 398 (9th Cir. 1952); *United States* v. *Peebles,* 220 F. 2d 114 (7th Cir. 1955); *Mintz* v. *Howlett,* 207 F. 2d 758 (2d Cir. 1953).

The petitioner was denied procedural due process of law upon his personal appearance. It may be argued that he was not entitled to the ministerial classification and consequently he was not harmed. But this is a specious argument. In *United States* v. *Graham,* 108 F. Supp. 794 (N. D. N. Y. 1952), the defendant was not entitled to the ministerial classification and the court did not find he was entitled to the conscientious objector classification, but the court

did hold that the denial of procedural due process of law was a basis for acquittal.

There are quite a number of cases where defendants have been acquitted where they were not entitled to the exemption or deferment claimed. Many cases have been reversed on procedural grounds notwithstanding the fact that the registrants were not entitled to claim the exemption. If the argument is accepted, that a defendant is not entitled to claim that there was a denial of procedural due process of law on personal appearance because he was not entitled to the classification of a minister, then it does away with the rule of strict compliance with procedural regulations entirely. It means that procedural problems do not hinge on whether the local board followed the law prescribed. It means that the courts in every case will have to determine whether the defendant is exempt. If he is exempt, he is entitled to procedural due process of law; if he is not exempt then he is not so entitled. This is a faulty and dangerous proposition advanced as a basis for holding harmless error. It means that only the innocent are entitled to procedural rights, but the guilty have no rights. This alien doctrine is entirely foreign to the concept of due process of law familiar to us all.

It may be argued by the Government that, since the hearings at which the local board proceeded upon an illegal theory of law were not personal appearances within the meaning of the regulations, the petitioner has suffered no harm. The Government argued in the court below that the hearings on December 5, 1952, and on May 3, 1954, were not personal appearances under Section 1624.2 (b) of the regulations. It was said that they were mere interviews because no timely requests within ten days of the local board classification were made.

The so-called interviews were conducted by the local board because the board had not given petitioner a personal appearance within ten days of the I-O classification of March 3, 1952. The board apparently was afraid that it

may have not granted petitioner his procedural rights following that classification. Let us turn now and see what the local board did before the case was ever sent to the appeal board.

On February 15, 1952, the local board classified petitioner. It notified him on February 18, 1952, of this classification. See the minutes on the back of the questionnaire. This classification was in violation of the regulations since the questionnaire showed petitioner was a conscientious objector. (R. 28) The local board, on the same day that it notified petitioner of the I-A classification, mailed him SSS Form No. 150, the special form for conscientious objector. This constituted a reopening of the classification. (*United States* v. *Vincelli,* 215 F. 2d 210; 216 F. 2d 681 (2d Cir. 1954)) The local board then reclassified petitioner as a conscientious objector on March 3, 1952.

Petitioner then wrote to the local board a letter entitled "Appeal for classification from 1-O to 4-D." (R. 40-42) This was not a request for a personal appearance. It also was not a formal appeal. The petitioner asked the board to reclassify him. (R. 41-42) The local board sent the papers to the appeal board within twenty-four hours after receiving the letter. (R. 29) The petitioner did not know about his file being with the appeal board until after August 7, 1952, when he was notified of the I-O appeal board classification. (R. 29) On November 24, 1952, petitioner wrote to the local board and for the first time complained that he had not been given a personal appearance. (R. 43) The local board responded and said he was not entitled to an appeal but that it would give him a personal appearance as requested. (R. 45) The local board then conducted the hearing on December 5, 1952. See the document entitled "Personal Appearance Summarization." (R. 46) The minutes opposite November 25, 1952, stated that he was granted "personal appearance for December 5, 1952." The minutes opposite December 5, 1952, the date for the hearing say

"Appeared before Board. No change in classification." (R. 30)

On April 14, 1952, the local board sent to the petitioner a form requesting information to be provided for filling out the questionnaire about the ministerial status of petitioner. (R. 52) Petitioner filled out this form and returned it on April 23, 1954. The local board then, on May 3, 1954, reviewed the new information submitted and determined not to reopen the classification. But the petitioner was not notified of the action taken.

While these were not personal appearances under Section 1624.2 (b) of the regulations, they were hearings upon requests to reopen under Section 1625.2. At the first of these (December 5, 1952) the petitioner personally appeared before the board. At the second (May 3, 1954) there was no personal appearance. The board acted without taking oral evidence on May 3, 1954, but solely upon the written questionnaire that it had received.

It is quite obvious from the above-stated evidence that the local board was considering the papers and the hearings as hearings on requests to reopen under Sections 1625.1 and 1625.2 of the regulations and proceeding under Part 1625 following an erroneous concept is a denial of procedural due process.—*United States* v. *Henderson,* 223 F. 2d 421 (7th Cir. 1955).

While it is conceded that the petitioner may not be entitled to the ministerial classification, it is strongly insisted that the manner of proceeding by the local board to pass upon the claim for exemption as a minister of religion constitutes a denial of procedural due process of law.

The conflict of circuits, the Second and the Sixth, on the question involved is one that should be resolved in the interests of orderly administration of the selective service laws in this field of criminal law. In addition the question is important for future cases of the same type that may arise. With the large number of cases constantly presenting

the question this Court should grant the writ and determine the question.

CONCLUSION

The petition for writ of certiorari should be granted for the reasons above stated.

Respectfully submitted,

HAYDEN C. COVINGTON
Counsel for Petitioner

April, 1957.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 275—October Term, 1956.
(Argued March 8, 1957 Decided March 28, 1957.)
Docket No. 24355

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—against—

WILBERT CHARLES SCHULTZ, JR.,
Defendant-Appellant.

Before:

MEDINA and WATERMAN, *Circuit Judges,* and
GALSTON, *District Judge.*

Appeal from a judgment of the United States District Court for the Northern District of New York, Stephen W. Brennan, *Judge.*

Defendant appeals from a judgment of conviction under an indictment under the Universal Military Training and Service Act, 50 U. S. C. App. Section 462, charging defendant with refusing to perform civilian work in lieu of induction into the armed forces. Affirmed.

THEODORE F. BOWES, United States Attorney, Syracuse, New York (Richard E. Bolton, Syracuse, of Counsel), *for plaintiff-appellee.*
HAYDEN C. COVINGTON, Brooklyn, New York, *for defendant-appellant.*

PER CURIAM:
Affirmed on the opinion of Judge Brennan.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of March one thousand nine hundred and fifty-seven.

Present: HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN, Circuit Judges
HON. CLARENCE G. GALSTON, District Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILBERT CHARLES SCHULTZ, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed

A. DANIEL FUSARO
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILBERT CHARLES SCHULTZ, JR.,
Defendant-Appellant.

Before Medina and Waterman, Circuit Judges,
and Galston, District Judge

Hayden C. Covington, Brooklyn, N. Y., for Appellant.

PER CURIAM:

The petition for rehearing is denied.

/s/ Harold R. Medina
U. S. Circuit Judge
/s/ Sterry R. Waterman
U. S. Circuit Judge
/s/ Clarence G. Galston
U. S. District Judge

Filed: April 15, 1957

APPENDIX D

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of April, one thousand nine hundred and fifty-seven.

Present: HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN, Circuit Judges
HON. CLARENCE G. GALSTON, District Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILBERT CHARLES SCHULTZ, JR.,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 966

WILBERT CHARLES SCHULTZ, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the Court of Appeals (Pet. App. 22-23) has not yet been reported. The opinion of the District Court (R. 4-13) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 28, 1957 (Pet. App. 24). A petition for rehearing was denied April 15, 1957 (Pet. App. 25). The petition for a writ of certiorari was filed May 3, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Although not denying that there was basis in fact for denial of his claim to ministerial exemption under the Universal Military Training and Service Act, petitioner challenges his ultimate I-O (conscientious objector) classification for alleged procedural errors. In this posture he presents the following questions:

1. Whether the local board proceeded on an erroneous theory that in order to qualify as an ordained minister a person must have had formal training.

2. Whether, after the local board on its own initiative sought current information on petitioner's status, it was required to give him formal notice that it did not deem that the new information required a change of classification.

STATUTES AND REGULATIONS INVOLVED

Section 16(g) of the Universal Military Training and Service Act (50 U.S.C. App. 466(g)) provides:

> (1) The term "duly ordained minister of religion" means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

(2) The term "regular minister of religion" means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

(3) The term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization.

The pertinent Selective Service Regulations (32 C.F.R.) provide:

§ *1622.43.* In Class IV-D shall be placed any registrant:

(1) Who is a regular minister of religion;

(2) Who is a duly ordained minister of religion;

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

(4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled.

§ *1625.1*

* * * * *

(c). The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

§ *1625.4.* When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted

does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Second Circuit (R. 64) affirming the judgment of the District Court for the Northern District of New York (R. 3-4) in which the District Court, upon trial without a jury, found petitioner guilty of failure and refusal to report for civilian work as a conscientious objector, in violation of Section 12 of the Universal Military Training and Service Act. Petitioner was sentenced to imprisonment for eighteen months (R. 4).

The record may be summarized as follows:

Petitioner was born on December 3, 1932 (R. 27). In his classification questionnaire, filed with the selective service board on February 11, 1952 (R. 25), he claimed to be both a regular minister of Jehovah's Witnesses and a student preparing for the ministry (R. 26). He stated that his occupation had been that of a carpenter (R. 27), and that his education included one year of high school, without graduation (R. 27). Upon his filing the special form for conscientious objectors, his classification was changed on February 29, 1952, from I-A to I-O (R. 29, 32-37).

In the special form, petitioner designated one Clyde Benson as the "pastor or leader" of his congregation (R. 36), but stated, "I preach from house to house. I attend the Theocratic Ministry school. If I am to do such civilian work as the board deem appropriate how am I going to preach of the kingdom of God" (R. 36).

On February 23, 1952, prior to the I-O classification, petitioner filed an appeal for classification IV-D as "a regular minister" (R. 37), in which he stated, *inter alia,* that his sect's "method of teaching and preaching" is "publicly and from house to house" (R. 38), and that he was "enrolled as a student under the direction of the Watchtower Bible & Tract Society and pursuing a full-time course of instruction and regularily [sic] engaging in the preaching work carried out by said Society, as a regular minister of religion" (R. 39). He did not set forth the time devoted to the claimed ministerial activities.

On March 13, 1952, after the I-O classification, petitioner filed a second appeal for classification IV-D as a "regular minister", in which he cited selective service regulations, and further described his training in the customary manner of Jehovah's Witnesses (R. 41). Petitioner attached an affidavit of the Company Servant and the Assistant Company Servant of the Wellsville Company, stating that petitioner was a "member" and had been "associating" for nearly a year, during which time he had been studying "to become a 'duly ordained minister' "; that for the past three months he had been "enrolled in the Theotratic [sic] Ministry School * * * that provides one the nessary [sic] preparation to become a 'duly ordained minister' "; that petitioner "has a very nice record as of preaching from house to house and on the street a work that is necessary to be classified as one of Jehovah's Witnesses" (R. 42-43).

The local board referred the appeal to the district Appeal Board on March 13, 1952. The Appeal Board, on July 31, 1952, classified petitioner I-O (R. 29).

On November 24, 1952, petitioner filed an appeal with the local board as a "duly ordained" minister, also stating that he had not had a personal appearance before the local board. The supporting certificate continued to designate Benson as Company Servant and one Weimer as Assistant Company Servant (R. 43-44). The clerk of the local board replied by letter (R. 45):

> * * * You appealed this classification on March 12, 1952 and your file was forwarded to the Appeal Board for this section. At that time you appealed for a classification of 4-D but the Appeal Board came back with a decision of 1-O by a vote of 3 to 0. The Appeal Board is over the Local Board and there is no further appeal provided by the Selective Service System.
>
> You have the right to appear before the Board at any time and if you desire I will give you an appointment for December 5th. However this Board can give you no appeal since your case has already been taken out of this Board's hands and into the Appeal Board.
>
> We are enclosing herewith papers which must be complied with within 10 days.

The papers referred to were Forms 152, LO 16-17, regarding three types of civilian work offered to petitioner as a conscientious objector. He informed the board that he would not designate any work, as he would not work for any government (R. 30, 45-46).

The board's summary of petitioner's personal interview on December 5, 1952, as prepared by a member of the board, recited (R. 47):

Information in cover sheet registrant feels local board overlooked or failed to give sufficient weight: Claims to be a member of Jehovah's Witness and is therefore an ordained minister although he has no educational training by an approved institute of learning. Objects to serving the U. S. Government in any manner.

At the trial, petitioner testified that, at the interview, the chairman of the board had informed him that the local board could not "go over the head of the Appeal Board; they could not re-open so they could not reclassify [him] no matter what evidence [he] might bring forth" (R. 15, 20), and that the chairman had said that the "certificate of ordination" was not from a "theological seminary" (R. 16, 19).

The clerk of the board testified that the regulation concerning ministerial classification was read to petitioner at the time of his interview in which, she said, it was stated that in order to obtain a IV-D classification it was necessary to be a graduate or student of a theological seminary (R. 22-23).[1] The clerk also testified that there was discussion of the "amount of time put in as a ministerial worker in comparison with the time [petitioner] was working outside" (R. 23).

In April, 1954, the board requested current information from petitioner concerning his secular and religious activities and conscientious objection (R. 52-53). Petitioner replied that he had worked 40 hours per week at Bausch & Lomb until the preceding October; that he was now working 24 hours per week as a car-

[1] The regulation (*supra*, p. 3-4) actually makes this a requirement for a IV-D classification as a ministerial student.

penter's helper for his father in return for room and board; that his income the past 12 months had been $1,540.73; that 45 persons were associated with the Wellsville congregation; that there were 41 "ministers actively preaching the Good News"; that petitioner was a "Publisher", "Stock Servant" and "Asst. Book Study Conductor"; that his average hours of claimed ministerial duties were 56 hours per month, of which "[p]reaching and distributing literature from house to house" were 38 hours, duties as stock servant 10 hours, "substituting for The Study Conductor" 3 hours, and the rest of the time apparently devoted to calling back on 23 people, two home "Bible Studies" and one 45 minute "Bible talk" (R. 53-54). The board found no basis for a new classification in petitioner's current information (R. 31, 56-57).

On May 10, 1954, petitioner was notified to report for hospital work at Marcy, New York (R. 57-58). Petitioner failed to appear (R. 60). On June 3, 1954, he was indicted for failure and refusal to report for the civilian work (R. 3).

The trial judge, in his memorandum-decision, preliminarily pointed out that there was no dispute as to the basis in fact for the board's classification, but only a question as to whether there had been error in procedure (R. 8). He reviewed the testimony concerning petitioner's personal interview with the board, and concluded (R. 12-13):

> Although defendant asserts in his direct examination that he was advised by the chairman that he was not entitled to a minister's rating, unless he was a graduate of a theological seminary, his own testimony on examination by the court in-

dicates that such was the witness's conclusion rather than the direct assertion of the chairman. * * *

* * * [T]he board did not act upon the assumption that a graduation certificate was the sole standard on which a IV-D classification as a minister could be based. To conclude otherwise would make the board's inquiry as to defendant's secular work as testified to by the clerk without either meaning or purpose.

ARGUMENT

Petitioner admits (Pet. 20) that there is basis in fact for denial of his claim to exemption as a minister. His own documents disclosed that he was not the leader, or assistant spiritual leader, of his congregation, that he had not even reached the 100-hour-per-month "pioneer" status, and that he did not devote sufficient time to his claimed ministerial or student work to meet the standards of *Dickinson* v. *United States,* 346 U. S. 389. He nevertheless claims that procedural errors in the method by which this proper result was reached invalidate his classification as a conscientious objector and justify his refusal to report for work of national importance. His claims in this respect are not supported by the record.[2]

1. Petitioner's chief argument is based on an assumption, which the district court specifically found not supported, that the local board denied his claim to ministerial status on the ground that he was not a grad-

[2] Petitioner does not press here the issue he urged below with respect to the local board's alleged refusal to reconsider his classification on the ground that it was bound by a prior decision of the Appeal Board (Pet. 2).

uate of a theological seminary. The trial judge found that the local board had not classified petitioner on the basis of such an erroneous theory as to the applicable law.

Petitioner had originally applied for exemption as a "regular minister of religion," defined in the statute, *supra,* p. 3, as one "who as his customary vocation preaches and teaches the principles of religion of a church * * *." Admittedly he failed to substantiate that claim. Only after the denial of his claim for exemption on that ground both by the local board, and the appeal board, did petitioner assert as new evidence that he was an "ordained", as distinguished from a "regular" minister of religion. In this respect the local board explored not only his education, which was certainly relevant, but also the number of hours devoted to secular and religious activities. The board also showed its understanding that the relationship between ministerial and secular activities was important by its questions addressed to petitioner in 1954 (R. 52-53).

In view of the finding by the trial court that the local board did not make its decision on the theory that formal education was essential for the exemption, no conflict exists between this case and *Niznik* v. *United States,* 184 F. 2d 972 (C.A. 6), or *Pate* v. *United States,* decided March 27, 1957 (C.A. 5) and the other cases alleged by the petitioner to be in conflict (Pet. 12-13) in which the courts found errors of law by the local boards. The only issue is whether the law was properly applied to the facts. In view of the concurrent findings of the lower courts, there is no occasion for further review here.

2. Petitioner raised below, and raises as a question here, the issue as to whether he was denied due process

in that the local board, in 1954, after requesting current information as to his ministry, did not formally notify him that it was not changing his classification. As the district court held, however, (R. 8-9), the board in 1954 was acting pursuant to Regulation 1625.1(c), *supra* p. 4, in keeping itself currently informed. Under such circumstances, there is no requirement for notice by the board when no change in classification is found warranted. Notice is required under 1625.4, *supra* pp. 4-5, only where there has been a request to reopen by an interested party. Petitioner made no such request in 1954.

Moreover, petitioner was notified, on May 10, 1954, within a week of the board's review of the current information, that he was to report—as a conscientious objector—for civilian service in lieu of service in the armed forces. This was certainly notice to him that his classification had not been changed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

MAY 1957.

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